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No. 84-585

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH LOMBARDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction.

2. Whether the district court applied an incorrect standard to determine that statements in a warrant application were not intentionally false or made with reckless disregard of the truth.

3. Whether electronically intercepted conversations that were evidence of bribery are inadmissible because they were obtained by agents while lawfully executing a warrant that authorized the interception of conversations pertaining to another offense.

4. Whether evidence obtained pursuant to an extension of a warrant authorizing a wiretap must be suppressed on the ground that the application for the extension was insufficient, even though the application established probable cause and any defects in it tended to diminish, not increase, the likelihood that a warrant would issue.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a)[1] is reported at 737 F.2d 594. The opinion of the district court denying petitioner's motion to suppress evidence (Pet. App. 44a-131a) is reported at 542 F. Supp. 345.

JURISDICTION

The judgment of the court of appeals (Pet. App. 41a) was entered on June 8, 1984. A petition for rehearing was denied on July 12, 1984 (Pet. App.

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[1] "Pet. App." refers to the appendix to the petition in No. 84-256. See Pet. 5 n.2.

42a-43a). On August 24, 1984, Justice Stevens extended the time for filing a petition for a writ of certiorari to October 10, 1984, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on all 11 counts of an indictment charging conspiracy to bribe a United States Senator, in violation of 18 U.S.C. 371; interstate travel to promote the bribery, in violation of 18 U.S.C. 1952; and wire fraud, in violation of 18 U.S.C. 1343 (Pet. App. 1a). He was sentenced to a 15-year term of imprisonment, to be followed by five years' probation, and fined $29,000. The court of appeals affirmed (Pet. App. 1a-40a).

Petitioner, together with co-defendants Roy L. Williams, Thomas F. O'Malley, Andrew G. Massa, and Allen Dorfman, all of whom were convicted on all 11 counts of the indictment, and unindicted co-conspirator William Webbe, devised and pursued a scheme to bribe Senator Howard Cannon of Nevada. The convictions of Williams, O'Malley, and Massa were affirmed. (Dorfman was killed prior to sentencing, and his case was dismissed as moot.) Williams (in No. 84-256) and O'Malley and Massa (in No. 84-292) have sought certiorari. Our consolidated response to their petitions (at 4-7) describes the evidence adduced at the suppression hearing and at trial.[2]

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[2] A copy of that brief in opposition has been served on counsel for petitioner.

ARGUMENT

1. Petitioner's principal contention (Pet. 8-15) is that the evidence was insufficient to support the verdict against him. Petitioner attempts to present this contention as a claim that the court of appeals applied a legal standard that is erroneous, that conflicts with the decisions of other courts of appeals, and that deprived petitioner of his right to have the charges against him proved beyond a reasonable doubt. In fact, however, the court of appeals did not apply any arguably erroneous legal standard; it simply reviewed the sufficiency of the evidence and correctly concluded that it was "ample" to support petitioner's conviction (Pet. App. 36a).

a. The court of appeals began its analysis by stating that "[a] person is not a co-conspirator, of course, if he is unaware of the 'essential nature' of the conspiracy" (Pet. App. 35a). In this connection, the court of appeals further stated (*id.* at 37a; citations omitted):

> That the word "deregulation" was not used in [petitioner's] conversations is of no moment. A co-conspirator need not know the details or every objective of the conspiracy. Knowledge of the conspiracy's essential nature or the "kind of criminal conduct . . . in fact contemplated," is sufficient.

Petitioner does not assert that any of these propositions constitutes an incorrect statement of the law. See Pet. 9 n.3, 11 n.5.

Instead, petitioner seizes on the court of appeals' remark that " '[p]resence has been sufficient evidence of knowing participation in a conspiracy when there were suspicious circumstances, and the existence of the conspiracy was already established.' " Pet. App.

36a, quoting *United States* v. *Dalzotto*, 603 F.2d 642, 645 (7th Cir.), cert. denied, 444 U.S. 994 (1979). Petitioner asserts that the court of appeals intended this passage to establish a "test"—what petitioner repeatedly calls "the 'presence plus suspicious circumstances' test" (Pet. 8; see *id.* at i, 9, 10, 13-14, 15). Petitioner attempts to equate this "test" with the view, stated by some courts, that "slight evidence" of a defendant's involvement in a conspiracy is enough to support a guilty verdict on a conspiracy charge (see *id.* at 8-9, 13-14). He then asserts that the "slight evidence" test has been rejected by several courts of appeals and is inconsistent with the principle that every element of an offense must be proved beyond a reasonable doubt (see *id.* at 8-9, 14-15).

In fact, the court of appeals' statement that a conspiracy can be established by showing presence combined with suspicious circumstances is not a "test" at all but a somewhat obvious truism: if the circumstances are sufficiently suspicious, then of course "presence plus suspicious circumstances" can support a conviction for conspiracy. The court of appeals never used the phrase "slight evidence" or applied a "slight evidence" test; on the contrary, as we noted, the court of appeals expressly found "ample" evidence to support the verdict (Pet. App. 36a).[3] Accordingly,

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[3] We do not dispute the proposition that it would be error to instruct a jury that it can convict a defendant of conspiracy on the basis of "slight evidence" rather than evidence that shows guilt beyond a reasonable doubt. But the jury instructions in this case (at 42-43) specifically required the jury to find the defendants guilty of conspiracy beyond a reasonable doubt; petitioner did not challenge those instructions at trial and he does not challenge them now. Petitioner's assertion (Pet. 15) that "what the Third Circuit has termed 'clearly . . . reversible error' is precisely what was done by

petitioner errs in asserting that the court of appeals applied a standard of review that is incorrect or that differs from the approach of other courts of appeals.

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the Seventh Circuit in this case" is therefore wrong; the Third Circuit's statement was: "Clearly, it would be reversible error *to charge a jury* that, once the government has shown the existence of a conspiracy, it may connect a particular defendant to it by 'slight evidence', rather than by evidence proving the connection beyond a reasonable doubt." *United States* v. *Cooper*, 567 F.2d 252, 253 (1977) (emphasis added).

Moreover, any seeming disagreement among the courts of appeals over the so-called "slight evidence" rule is more apparent than real. Indeed, several of the court of appeals decisions that petitioner cites (Pet. 14) as rejecting the "slight evidence" rule have not overruled circuit precedent applying the rule but have simply explained that the rule is a (perhaps infelicitous) way of phrasing well-recognized legal principles. See, *e.g.*, *United States* v. *Dunn*, 564 F.2d 348, 350-357 (9th Cir. 1977). For example, in *United States* v. *Cooper*, *supra*, the court of appeals decision on which petitioner most heavily relies (see Pet. 14-15), the Third Circuit explained the innocuousness of the "slight evidence" rule as follows (567 F.2d at 253; footnote omitted):

> [S]ome recent Third Circuit decisions * * * do refer to "slight evidence," but they cannot be understood to establish the novel rule that the prosecution in a conspiracy case is relieved of the burden of proving every element of the offense beyond a reasonable doubt. * * *
>
> The reference to "slight evidence" in the cases cited * * * is no more than a shorthand expression of the rule that, after a guilty verdict by a jury or a finding of guilt by a trial court, an appellate tribunal may not substitute its inferences from the evidence for those drawn by the factfinder, if there was sufficient evidence to submit to the factfinder in the first place. * * * As we observed in *United States* v. *Kates*, 508 F.2d 308, 310-11 (1975), to convict a defendant of participating in a conspiracy, there must be *some* evidence tending to prove that he entered into an agreement and that he knew the agree-

b. Petitioner is, therefore, actually challenging not the standard that the court of appeals applied but its result; petitioner's claim is simply that the evidence was not sufficient to support his conviction. See Pet. 10-13. This Court does not ordinarily consider such fact-bound claims. See, *e.g.*, *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 8; *United States* v. *Ceccolini*, 435 U.S. 268, 273 (1978). But in any event, the court of appeals' ruling was clearly correct.

Tape recordings of five conversations in which petitioner participated were admitted into evidence. In the conversations of January 30 and February 2, 1979 (C. A. App. 1-10, 15-24),[4] petitioner, Webbe, Dorfman, and Massa talked in guarded language about the trip that O'Malley and Massa took on January 30 to persuade Glick to withdraw his bid on the

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ment had the specific unlawful purpose charged in the indictment.

So understood, of course, the "slight evidence" rule is no more inconsistent with the requirement of proof beyond a reasonable doubt than is this Court's statement that "[t]he verdict of a jury must be sustained if there is *substantial* evidence, taking the view most favorable to the Government, to support it." *Glasser* v. *United States*, 315 U.S. 60, 80 (1942) (emphasis added); see *United States* v. *Malatesta*, 590 F.2d 1379, 1381-1382 (5th Cir.) (en banc), cert. denied, 444 U.S. 846 (1979).

Since the "slight evidence" rule is a matter more of phraseology than of substance, and since the court below did not mention "slight evidence" and expressly found "ample evidence," it is of no consequence that some prior Seventh Circuit cases have nominally applied the "slight evidence" rule. See, *e.g.*, *Dalzotto*, 603 F.2d at 645.

[4] "C.A. App." refers to the appendix filed by the government in the court of appeals.

Wonderworld property. In his January 30 conversation with Dorfman, petitioner said that "the man" had said that Williams should "handle it," referring to the proposed effort to persuade Glick to withdraw his bid, because Williams was "the guy that okayed it" (*id.* at 5-6). Dorfman and petitioner then discussed who should make the trip to see Glick. Petitioner said that "someone on the Pension Fund has to go talk to [h]im" because "they okayed it, and they gave you the ah guarantee" (*id.* at 7-8). When Dorfman agreed that someone from the Pension Fund should handle the approach to Glick, petitioner proposed O'Malley and Massa (*id.* at 8). Petitioner added, however, that Williams would first have to give his approval (*id.* at 9).

On February 2, after the successful O'Malley-Massa trip, Webbe reported to petitioner that Glick was "willing to back off" (C. A. App. 17). Petitioner exclaimed "Beautiful * * * No kiddin['] * * * No kiddin[']" (*ibid.*) and claimed credit for the suggestion to have O'Malley and Massa approach Glick (*id.* at 21-22). Webbe added that Glick had said that "if he knew what it was all about from the beginning he would of never gotten involved in it" (*id.* at 17). At one point during the conversation, petitioner said to Webbe: "Just don't mention names, ya know what I mean?" (*ibid.*). At the conclusion of the conversation, petitioner directed Webbe to "stay right on top of it," and Webbe responded that he would "let you guys know out there the minute everything is completed" (*id.* at 23-24).

On May 17, Dorfman was overheard in his office complaining to petitioner about the way the Pension Fund assets were being managed. In particular, Dorfman complained that the asset managers

were not paying attention to the Teamster leaders. Petitioner responded, "You got a, you got an example with Palmieri. With the Cannon deal." C.A. App. 194; Pet. App. 36a-37a. Petitioner and Dorfman then engaged in a discussion of the frustrations that had plagued the efforts to steer the Wonderworld property to Senator Cannon's group (C.A. App. 194-195).

Five days later, petitioner and Massa were with Dorfman in his office when Dorfman engaged in a lengthy discussion of the failure to fulfill the commitment to Senator Cannon (C.A. App. 241-242). For example, Dorfman remarked (*id.* at 242): "I'm gonna call the Senator, tell him as far as I'm concerned, Senator, I, there is nothing I can do about it anymore. It's out of my hands. If he wants to go for the [expletive] deal, let him go for the deal." From the tone and context of Dorfman's comments, the jury could readily infer that Dorfman was talking to people who were already well acquainted with the background of the transaction.

Finally, in January 1980, petitioner participated in a discussion with Dorfman, O'Malley, and Massa concerning what they suspected was a federal investigation of the Wonderworld transaction. Massa expressed great concern about the investigation, saying that he and O'Malley were in particular jeopardy because "we took a trip to California" (C.A. App. 268). Dorfman and petitioner then made suggestions about how to respond to the investigation. Dorfman proposed an exculpatory story (*ibid.*), and petitioner suggested that they should feign lack of memory (*id.* at 269).

Certain facts are immediately clear from these conversations. First, petitioner was deeply involved in attempting to persuade Glick to withdraw his bid.

Indeed, petitioner supervised much of this aspect of the scheme; for example, he proposed that O'Malley and Massa travel to California for that purpose. Second, petitioner knew that the purpose of approaching Glick was to ensure that the property would be steered to Senator Cannon. Indeed, petitioner appears to concede that the evidence sufficiently demonstrated these points. See, *e.g.*, Pet. 13.

The evidence was also more than sufficient to justify the jury's finding that petitioner knew that the property was being steered to Senator Cannon for an illegal purpose. Petitioner spoke in guarded terms; he cautioned Webbe not to use names; and, most significantly, he counselled O'Malley and Massa to feign loss of memory in order to subvert a possible federal investigation. Petitioner suggests (Pet. 12-13 & n.7) that this evidence shows only that he was making a campaign contribution that he wished to keep secret. Petitioner was certainly free to argue to the jury that, although he believed he was making a lawful payment, he was so concerned with secrecy that he was prepared to engage in obstruction of justice; but it was hardly irrational for the jury to conclude otherwise.

The jury accordingly had abundant evidence from which to determine that petitioner furthered a scheme to make an illegal payment to Senator Cannon. Petitioner's response (Pet. 11 & n.6) appears to be that while this evidence may have been sufficient to support a conviction for conspiracy to give an illegal gratuity, in violation of 18 U.S.C. 201(f), it was not sufficient to support a conviction for conspiracy to commit bribery, in violation of 18 U.S.C. 201(b), because petitioner "*did not know* that the conspirators intended to obtain specific legislative

support from the Senator in exchange for the assistance" (Pet. 13). But there was ample evidence from which the jury could have concluded that petitioner was well aware of the nature of the scheme. Petitioner's statement that Williams should approve the choice of O'Malley and Massa envinced an awareness of Williams's concern that the property be successfully steered to Senator Cannon—a concern that grew out of Williams's interest in deregulation. Webbe's statement to petitioner about Glick's reaction to the O'Malley-Massa mission—that Glick had said that he would not have bid on the property "if he knew what it was all about"—was evidence that petitioner also "knew what it was all about." Petitioner's ability to discuss the transaction without using names demonstrated an intimate familiarity with the scheme.

In addition, the jury was persuaded beyond a reasonable doubt that Dorfman, Williams, O'Malley, and Massa all knew the purpose of the scheme. They heard Dorfman, in particular, and Webbe discuss the scheme with petitioner in a way that strongly suggested that the other conspirators were not holding anything back from petitioner and that he was a full participant in the scheme. Petitioner never expressed confusion or uncertainty about the nature of the scheme, and his co-conspirators did not give the slightest indication that they were concealing any aspect of the scheme from petitioner. Indeed, petitioner was not a subordinate figure in the conspiracy; he dictated to Dorfman that O'Malley and Massa would be used as emissaries to Glick. In these circumstances, the jury was certainly entitled to conclude that petitioner knew the "essential nature" of the scheme.

2. Petitioner, like Williams, O'Malley, and Massa (see 84-256 Pet. 14), contends that some of the electronically overheard conversations should not have been admitted into evidence because the affidavit supporting the application for the March 1, 1979, order authorizing an extension of the interception contained a statement that proved to be erroneous. Specifically, as we explained in our brief in opposition in Nos. 84-256 and 84-292 (at 3-4, 14), the affidavit, executed by FBI Special Agent Wacks, stated that some conversations overheard during earlier surveillance concerned the "promotion and management of hidden and unlawful financial interests in the Aladdin hotel-casino" (Pet. 10a), when in fact those conversations concerned the conspiracy to bribe Senator Cannon (*ibid.*).

Under *Franks* v. *Delaware*, 438 U.S. 154, 171 (1978), the fact that erroneous statements are included in a search warrant affidavit is not a justification for suppressing evidence obtained pursuant to the warrant unless the statements are intentionally false or made with reckless disregard for the truth. After conducting a hearing, the district court, in a detailed discussion, rejected the defendants' contention that *Franks* required the suppression of the intercepted conversations (Pet. App. 77a-90a). The district court discussed the applicable legal principles as follows (*id.* at 67a-68a):

> *Franks* provides little guidance as to what constitutes "reckless disregard for the truth." A useful analogy, however, is provided by the principle of first amendment law that liability for a defamatory statement regarding a public figure cannot be imposed unless the plaintiff proves that the defendant acted with reckless disregard for the truth * * *.

> [T]his branch of first amendment law * * * indicates that the reckless disregard for truth required by *Franks* is not established by a mere failure to investigate. Rather, it can only be demonstrated if [petitioner] can establish that the government in fact entertained serious doubts as to the truth of the affidavits or had obvious reasons to doubt the accuracy of the information contained therein.

The court of appeals agreed that the district court had applied the correct legal principles and upheld its determination as not clearly erroneous (*id.* at 11a-15a), concluding that the intercepted "conversations by themselves could have led a reasonable person to conclude that Allen Dorfman and his associates were involved in an effort to acquire, promote, or manage a hidden interest in the Aladdin hotel-casino. And Special Agent Wacks' investigation revealed further facts to support such a thesis." *Id.* at 12a.

Williams, O'Malley, and Massa did not object to the definition of "reckless disregard for the truth" that was employed by the district court; they claimed only that the court of appeals was excessively deferential in applying the clearly erroneous standard to the district court's ruling. See 84-256 U.S. Br. in Opp. 15-16. By contrast, petitioner contends (Pet. 15-23) that the district court erred in drawing an analogy between *Franks* and such First Amendment cases as *St. Amant* v. *Thompson*, 390 U.S. 727, 731-732 (1968), that define the showing a public figure must make in order to recover for defamation.

As we have noted (see 84-256 U.S. Br. in Opp. 16), neither the district court nor the court of appeals considered it a close or difficult question whether Special Agent Wacks's statement was intentionally false

or made with reckless disregard of the truth. See Pet. App. 11a-15a, 72a-90a. Thus it seems likely that the courts below would have rejected petitioner's claim under any plausible definition of "reckless disregard of the truth."

But in any event, the analogy to the First Amendment cases was entirely appropriate. Petitioner discusses at length various First and Fourth Amendment policies and attempts to argue that the standard for determining whether a public figure can recover for libel should not be the same as the standard for determining whether false statements in a search warrant affidavit require suppression of evidence obtained pursuant to the warrant. See, *e.g.*, Pet. 17-20. But this contention is foreclosed by the decisions of this Court: the Court has already determined that a standard of "reckless disregard of the truth" is to apply in both contexts. Compare *Franks*, 438 U.S. at 155-156 (a defendant seeking to have evidence suppressed must make a "showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit") and *id.* at 171 ("There must be allegations of deliberate falsehood or of reckless disregard for the truth") with *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964) (public official plaintiff must prove "that the statement was made * * * with knowledge that it was false or with reckless disregard of whether it was false or not"). "Recklessness" is a familiar notion in the law, and this Court determined that requiring a showing of recklessness would strike the proper balance among the competing considerations in both the First Amendment area and the *Franks* area. Petitioner's

arguments demonstrate no more than that he would strike the balance differently.[5]

Finally, we note that while petitioner challenges the definition of "reckless disregard of the truth" used by the courts below, he is unable to offer an alternative. Petitioner insists (Pet. 20-22) that an "objective" standard should be applied, but he fails to explain why the standard used by the district court—that a statement was made with reckless disregard for the truth if the affiant "had obvious reasons to doubt the accuracy of the information contained therein" (Pet. App. 68a)—is insufficiently "objective." The only specific definition of recklessness that petitioner proposes (Pet. 21 n.14) is neither obviously different from that used by the courts below nor obviously more favorable to the defense.[6]

3. Petitioner contends (Pet. 23-24), as did his coconspirators in Nos. 84-256 and 84-292, that the district court should have suppressed the contents of 33 conversations overheard pursuant to court orders before April 28, 1979, the date of the first application that alleged a conspiracy to bribe Senator Cannon.

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[5] In addition, in contending that "[t]he government's interest in surreptitiously intercepting private communications * * * is not analogous to a publisher's protected right to speak out about public affairs" (Pet. 18), petitioner ignores the considerations that militate against allowing suppression of evidence to be used as a remedy for a false warrant affidavit—considerations that this Court carefully canvassed in *Franks* and concluded were substantial (438 U.S. at 165-167).

[6] Petitioner asserts (Pet. 21-22 & n.15) that the decision below conflicts with *United States* v. *Namer*, 680 F.2d 1088 (5th Cir. 1982). But in *Namer* the court of appeals simply concluded, on the particular facts of the case, that the affiant had shown a reckless disregard for the truth; nothing in *Namer* suggests that the Fifth Circuit would have disagreed with the court below on the facts of this case.

Petitioner argues that the orders did not authorize the recording of these conversations and that the conversations were not so obviously incriminating that they can be analogized to physical evidence that can be seized if found in plain view. The court of appeals correctly rejected this contention (Pet. App. 15a-19a), and as we show in our brief in opposition in Nos. 84-256 and 84-292 (at 7-11), further review of this issue is not warranted.

4. Petitioner has also raised (Pet. 25-26) the argument made by his co-conspirators in Nos. 84-256 and 84-292 that the government's first application for an extension of its wiretap authorization, filed on March 1, 1979, was invalid because it did not include the explanation required by 18 U.S.C. 2518(1)(f). In our brief in opposition in Nos. 84-256 and 84-292 (at 11-16), we explain why this issue does not merit further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

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